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IN THE

# Supreme Court of the United States

October Term, 1952
No. 517

OLIVE B. BARROWS, RICHARD PIKAAR and M. M. O'GARA,
*Petitioners,*

*vs.*

LEOLA JACKSON,
*Respondent.*

**Petition for a Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District.**

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*vs.*

LEOLA JACKSON,

*Respondent.*

**Petition for a Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District.**

Petitioners pray that a writ of certiorari issue to review the judgment of the District Court of Appeal of the State of California, Second Appellate District, entered in the above entitled case on August 6, 1952.

## Opinions Below.

The Memorandum Opinion of the trial court [R. 8-16] is unreported. The opinion of the District Court of Appeal [R. 30-56] is reported in 112 A. C. A. 613; 247 P. 2d 99. Rehearing denied September 4, 1952. Hearing in the Supreme Court of the State of California denied October 2, 1952, by a vote of four to three [R. 58].

## Jurisdiction.

The order of the Supreme Court of the State of California denying petitioners' petition for hearing was entered on October 2, 1932. (*American Railway Express Co. v. Levee*, 263 U. S. 19, 20-21.) Three of the seven justices were of the opinion that a hearing should be granted [R. 58]. The jurisdiction of this court is invoked under 28 U. S. C. A., Secs. 1257(3) and 2101(c).

The right of equal protection of the laws and the right to the due process of law claimed under the Fourteenth Amendment to the Constitution of the United States was specially set up by defendant and respondent in her demurrer to plaintiffs' second amended complaint [R. 8] in the following language:

> "Said second amended complaint and each cause of action therein set forth does not state facts sufficient to constitute a cause of action under the proposition that entertainment of this suit would deny the defendant the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.
>
> "Said second amended complaint and each cause of action therein set forth does not state facts sufficient to constitute a cause of action under the proposition that entertainment of this suit would deny the defendant due process of law guaranteed by the Constitution of the United States."

The above rights were urged by respondent in her reply brief in the District Court of Appeal.

The above federal questions were passed upon by the District Court of Appeal in respondent's favor in the following language:

> [R. 32.] "We first consider whether a cause of action is stated for damages for breach of contract under common law principles."
>
> [R. 34.] "We hold that apart from the constitutional issue the complaint states a cause of action for damages."
>
> [R. 54.] "The fact that the non-Caucasian is not a party to the action, and that an award of damages operates against the covenantor directly rather than directly against the non-Caucasian, does not affect the result. In an action at law for damages the rights and interest of the particular non-Caucasian would be secure and unaffected by any judgment rendered. However, enforcement of the covenant would effectively deny non-Caucasian citizens equality in the enjoyment of property rights because property owners in restricted areas are deterred from permitting use or occupancy by non-Caucasians lest they be personally liable for damages. No person has the right, nor does the state have the power, to require the enforcement of a covenant which will result in the denial to any individual of the equal protection of the laws. Any recognition of a racial restrictive covenant in an action in a state court constitutes prohibited state action."

The right, privilege or immunity of petitioners under the Fourteenth Amendment to the Constitution of the

United States against being deprived of property without due process of law was set up in the trial court,[1] in petitioners' opening brief in the District Court of Appeal,[2] and in petitioners' petition for hearing in the Supreme Court of the State of California [R. 19 and 23].

The above federal question was passed upon unfavorably to the petitioners by the District Court of Appeal in the following language:

> [R. 33.] "Agreements such as here involved have heretofore been held to constitute a lawful exercise of the freedom to contract (and) as such to be enforceable by the courts."
>
> [R. 34.] "We hold that apart from the constitutional issue the complaint states a cause of action for damages."
>
> [R. 34.] "The parties agree, as they must, that the covenant, as such, is constitutionally a valid agreement; . . ."
>
> [R. 55.] "The denial of access to the courts does not deprive plaintiffs of their property without due process of law."

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[1]Petitioners' Points and Authorities in opposition to respondent's demurrer at page 21:

> "As an additional reason why the demurrer filed by the defendants should be overruled, plaintiffs respectfully submit that the refusal of the court to allow them to recover such actual damages as can be proved to have resulted from the breach of the agreement alleged would deprive plaintiffs of property without due process of law, in violation of the Fourteenth Amendment to the Constitution."

[2]Appellants' Opening Brief, pages 68-71:

> "9. Refusal of Remedy will Deprive Appellants of Valuable Property Rights Without Due Process of Law in Violation of the Fourteenth Amendment to the Constitution of the United States."

The right of petitioners to make and enforce contracts guaranteed as a civil right under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States was set up and claimed by petitioners' reply brief in the District Court of Appeal of the State of California, Second Appellate District,[3] and in petitioners' petition for a rehearing [R. 17] and in petitioners' petition for hearing in the Supreme Court of California [R. 19, 20 and 23]. This federal question was not passed upon by the state courts.

The right, privilege and immunity of petitioners under Article I, Section 10, of the Constitution of the United States against the impairing by any state of the obligation of contracts was raised when first it appeared that this right had been violated, *i. e.*, in petitioners' opening brief in the District Court of Appeal[4] and in petitioners' petition for rehearing [R. 17] and in petitioners' petition for hearing in the Supreme Court of the State of California [R. 20 and 25]. This federal question was not passed upon by the state courts.

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[3]"It is plain, therefore, that the only civil right involved in this case is the 'right to make and enforce contracts.'"

[4]Appellants' Opening Brief, pages 71-73:

"10. Refusal by a Court to Grant Any Remedy Against a Party to a Valid Contract for the Breach Thereof Is an Exercise of a Legislative Prerogative and Would Impair the Obligation of Contract in Violation of Article I, Section 10 of the United States Constitution. . . ."

## Questions Presented.

1. Would a judgment for damages against respondent for breach of her own valid racial restrictive agreement deny her (not another or others) equal protection of the laws, or deprive her (not another or others) of life, liberty, or property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States?

2. Has the State of California deprived petitioners of property without due process of law and denied petitioners the civil right to make and enforce contracts, contrary to the due process clause and equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States or impaired the obligation of contract, contrary to Article I, Section 10, of the Constitution of the United States?

## Statement of the Case.

On or about the 21st day of October, 1944, petitioners Barrows [R. 1] and O'Gara [R. 2] and the ancestor in title of petitioner Pikaar [R. 2], and respondent Leola Jackson [R. 2], each owned lots in Tract 1462 in the City of Los Angeles. On or about that date, in consideration of the mutual benefit to themselves and their respective properties, said owners, including respondent, executed and caused to be recorded an "agreement imposing restrictions" [R. 2]. By the terms of said agreement each of the signers promised and bound himself, his heirs, executors, administrators, successors and assigns, by a continuing covenant, that no part of his said real property described therein should ever at any time be

used or occupied by any person or persons not wholly of the white or Caucasian race [R. 3]. By the terms of said agreement each of the signers further promised that this restriction should be incorporated in all papers and transfers of lots or parcels of land of said signers [R. 3].

On or about February 2, 1950, respondent, Leola Jackson, and one, Dorothy May Grace, executed a grant deed to Pearnell Smalley and Florine Smalley [R. 4]. Respondent, Leola Jackson, failed to incorporate in said deed the restriction contained in said agreement against use and occupancy by persons not wholly of the white or Caucasian race, which failure constituted the first breach of respondent's contract complained of by petitioners [R. 5].

On or about September 4, 1950, persons not of the white or Caucasian race moved into and began to use and occupy the property as to which respondent had contracted that it would never at any time be used or occupied by persons not of the white or Caucasian race [R. 4]. Said use and occupancy on or about and after the 4th day of September, 1950, constituted the second breach of respondent's contract complained of by petitioners. As a result of the breaches of contract, and each of them, petitioners have suffered actual and severe depreciation in the value of their property, as alleged in their second amended complaint [R. 5 and 6]. Respondent's demurrer was sustained without leave to amend [R. 16]. The judgment sustaining respondent's demurrer was affirmed [R. 56].

## Specifications of Errors to Be Urged.

The District Court of Appeal of the State of California, Second Appellate District erred:

1. In enlarging the holding in *Shelley v. Kraemer* (1948), 334 U. S. 1, by erroneously interpreting it to apply to the radically different facts of the case at bar, ignoring the distinctions urged in the briefs of petitioners in the restrictive covenant cases, and apparently adopted by the opinions therein.

2. In basing its opinion upon the speculative effect of a judgment for petitioners upon persons unknown, not parties to the action, and in failing to base its opinion upon the rights of respondent alone.

3. In failing to follow the rule of *Walker v. Whitehead*, 83 U. S. 314, 21 L. Ed. 357, that the ideas of validity of a contract and remedy against the original contracting party for its breach are inseparable and are both parts of the right which is guaranteed by the Constitution of the United States.

4. In affirming the judgment of the Superior Court.

## Reasons for Granting the Writ.

1. The questions presented are federal questions of extreme importance, involving as they do the right to enforce all valid contracts as between the original parties thereto. The questions presented are not peculiar to the enforcement of racial restrictive covenants in damages between the original parties but affect the enforcement of all contracts since every valid contract would be unenforceable against the original parties if it contained a

classification which could not be placed in a statute or ordinance. As applied to racial restrictive agreements alone the questions are of urgent national importance. Numerous cases have been filed in the courts of California, of which the case at bar became the test case. Similar litigation has arisen in Washington, D. C., Missouri, Oklahoma and Michigan, with conflicting results. Home owners in all parts of the United States have an interest in having the Supreme Court of the United States declare that their property in such contracts cannot be taken without due process of law, nor the obligation thereof impaired. The importance of defining and declaring the rights of those particular litigants under the set of facts as therein presented has been recognized in five previous cases, *Corrigan v. Buckley* (1926), 271 U. S. 323; *Shelley v. Kraemer; McGee v. Sipes* (1948), 334 U. S. 1; *Hurd v. Hodge; Urciolo v. Hodge* (1948), 334 U. S. 24. Settlement of these questions by this court is plainly in the public interest.

2. The judgment of the District Court of Appeal of the State of California, Second Appellate District, has decided a substantial and unsettled federal question arising under the Constitution of the United States, which was recognized by Justice Edgerton in his dissent in *Hurd v. Hodge* (1947), 162 F. 2d 233 at p. 240n, but which was left open by this court in *Hurd v. Hodge, supra*, and *Shelley v. Kraemer, supra*. This unsettled federal question has been the subject of speculation in law review articles and annotations.

In his note on page 240 of his dissent in *Hurd v. Hodge* in the United States Court of Appeal for the District of Columbia, Mr. Justice Edgerton used this language:

> ". . . to say that the Constitution forbids direct and actual enforcement of a racial covenant by injunction—the only remedy which is intended to and necessarily does prevent Negroes from acquiring and using the restricted property—is not to say that it forbids awarding to a neighboring property owner, such damages, if any, as an executed sale to a Negro may be shown to have caused."

It is significant that Mr. Justice Edgerton used this language although he was dissenting from the judgment of the court enforcing the covenant by injunction. Although Mr. Justice Edgerton felt that the covenants were contrary to public policy (p. 242), he recognized that the constitutional question and the public policy question were separate and distinct by stating in his note that the constitution did not forbid awarding such actual damages as may be shown to have been suffered. The public policy question is not a federal question[5] and has been decided in petitioner's favor by the District Court of

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[5] "It is obvious that none of these amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property; and there is no color whatever for the contention that they rendered the indenture void. And, plainly, the claim urged in this court that they were to be looked to, in connection with the provisions of the revised statutes and the decisions of the courts, in determining the contention, earnestly pressed, that the indenture is void as being *'against public policy' does not involve a constitutional question within the meaning of the code provision.*". (Emphasis added.)

*Corrigan v. Buckley*, 271 U. S. 323, at 330, 70 L. Ed. 969, at 973.

Appeal[6] following an unbroken line of authorities in California[7] and is not subject to review[8].

In his article in 16 University of Chicago Law Review 22, Assistant Professor John D. Frank, after assuming his conclusion extending the opinion in the *Shelley* case, *supra*, beyond its facts and reasoning, expressed this regret on page 24:

> "It is doubtful that the court meant to go so far and some theory of limitation will emerge . . . that a limitation is intended is indicated by the firm emphasis with which the court went out of its way to reaffirm the civil rights cases and to declare that the Fourteenth Amendment erects no shield against merely private conduct, however, discriminatory or wrongful."

The unsettled state of the law after the rendition of the decision in *Shelley v. Kraemer*, *supra*, and *Hurd v.*

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[6]"Agreements such as here involved have heretofore been held to constitute a lawful exercise of the freedom to contract (and) as such to be enforceable by the courts." [R. 33.]

"We hold that apart from the constitutional issue the complaint states a cause of action for damages." [R. 34.]

[7]The following from *Burkhardt v. Lofton*, 63 Cal. App. 2d 230, is the language of Presiding Justice Shinn, who participated in deciding the case at bar:

> "A right to contract with reference to their own property is one that is reserved to all citizens and, except where restricted by law, is a right which the people of all races may exercise freely . . . The responsibility of striking down the validity of racial restrictions with respect to the use and occupancy of real property is one which no court or judge should assume on the strength of individual theories as to what constitutes the 'present' public policy on the subject or a personal belief that the consequences would be for the general good."

[8]*Corrigan v. Buckley*, *supra*.

*Hodge, supra,* is further illustrated by the following quotation from 3 A. L. R. 2d at page 473:

> "One question which may remain open is that as to the right to maintain an action for damages for breach of a racial restrictive covenant or agreement . . . . Just what effect Shelley v. Kraemer may have on the maintainability of such lawsuits is a question that has not been decided in any of the cases at this writing."

3. There is a direct conflict in the decisions of the highest courts in which a decision could be had in the states of California,[9] Michigan,[10] Missouri[11] and Oklahoma[12] upon the vital constitutional questions involved in this case. The Supreme Court of Michigan and the District Court of Appeal of California have enlarged the opinions in *Shelley v. Kraemer, supra,* and *Hurd v. Hodge, supra,* by interpreting them as preventing any kind of court action based upon a restrictive covenant. The Supreme Courts of Missouri and Oklahoma have held that damages resulting from the breach of racial restrictive covenants could be recovered in their respective state courts.

Any possible distinguishing features among the cases serve but to make more plain the error in the decision of the District Court of Appeal of the State of Cali-

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[9]*Barrows v. Jackson* (1952), 112 A. C. A. 613, 247 P. 2d 99 [R. 30, 58].

[10]*Phillips v. Naff* (1952), 332 Mich. 389, 52 N. W. 2d 158.

[11]*Weiss v. Leaon*, 359 Mo. 1054, 225 S. W. 127.

[12]*Correll v. Earley* (1951), ..... Okla. ....., 237 P. 2d 1017.

fornia in *Barrows v. Jackson* [R. 30] and do not remove the direct conflict between the decisions of the courts of last resort of these four states.

4. The District Court of Appeal of the State of California, Second Appellate District, has decided a substantial federal question arising under the Constitution of the United States and has decided it in a way probably not in accord with applicable decisions of this court.

a. This court decided in *Corrigan v. Buckley, supra,* that racial restrictive agreements are valid contracts. That case was recognized and reaffirmed by this court in *Shelley v. Kraemer, supra.* A long line of unbroken authority in the Supreme Court and District Courts of Appeal in California (including this case) established the validity of racial restrictive agreements under the state law of California. Yet the opinion of the state court in this case holds that this valid contract cannot be enforced against respondent, an original signatory, which holding is not in accord with the obvious rule laid down by this court in *Walker v. Whitehead (supra),* that the ideas of validity of a contract and remedy against the original contracting party for its breach are inseparable. It is self-evident that the property right which each party to a contract has in that contract and which is guaranteed by the due process clause of the Fourteenth Amendment to the Constitution of the United States is the right to relief in the courts against the party to the contract responsible by the terms of their contract for its breach. It may be conceded

that the property right of a party to a contract does not include a right to recover against a stranger to the contract or against a person who, for other reasons (as in *Shelley v. Kraemer*), is not himself a party to the contract. But it is a contradiction of terms and a violation of the rule in *Walker v. Whitehead, supra,* to hold that the valid contract sued upon herein cannot be enforced in damages against respondent, an original party. The opinion of the state court refers in Note 32 [R. 52] to three examples of "valid but unenforceable agreements." All three examples exist in California because of statutes[13] and therefore are terms of the contract as though set forth therein in full.[14] Could a state court, *without the aid of a constitutional statute,* LIMIT the rights of contracting parties as in *Home Building & Loan Assn. v. Blaisdell* (1933), 290 U. S. 398, 78 L. Ed. 413, without violating Article 1, Section 10, of the Constitution of the United States? Yet the state court here

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[13]Civil Code of California, Section 3359. "Damages to Be Reasonable. Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered."

Any rule beyond this which a court applied would cause the contract to be void by definition. It is confounding confusion to say that although a contract is constitutionally valid, it is constitutionally unenforceable in any way against anyone, even the original parties.

[14]". . . 'All applicable laws in existence when an agreement is made necessarily enter into it, and form a part of it as fully as if they were expressly referred to and incorporated in its terms.'"

*Wing v. Forest Lawn Cemetery Assn.,* 15 Cal. 2d 472, 476.

has *entirely* DESTROYED ALL of petitioners' rights in this valid contract.

b. This court decided in *Liberty Whse. Co. v. Burley T. G. Coop. M. Assn.*, 276 U. S. 71 at 88, that a person relying upon a constitutional defense must show that he—not another—would be deprived of some right arising under the Constitution of the United States. The same was held in *Tileston v. Ullman*, 318 U. S. 44; *Columbus & G. R. Co. v. Miller*, 283 U. S. 96, 99, 100; and *Ashwander v. T. V. A.*, 297 U. S. 288, 347, 348. In its opinion in *Shelley v. Kraemer, supra*, the same rule was recognized and followed by the repeated use of the words "these petitioners." Accordingly, in order to prevail, respondent should have been required to show that a judgment for petitioners would have deprived her—not another or others—of some right arising under the Constitution of the United States. The decision of the state court herein is not in accord with the above decisions of this court. Nowhere in the opinion [R. 30 to R. 56] is it said that respondent is herself denied any rights under the Constitution of the United States. Frequent reference is made to particular constitutional rights, but never is it said that the rights referred to are respondent's rights. Furthermore, the rights referred to are rights which could not be respondent's rights, to wit:

> "The doctrine of the Shelley case, as we read it, means that no state sanction, direct or indirect, can constitutionally be imposed for the breach of a restrictive covenant if such sanction would *result* in

> the denial of any civil rights guaranteed by the Constitution. Of the civil rights conferred, none is clearer and few more vital than the right to *buy a home and live in it*. Distinction between direct and *indirect* state action is tenuous." (Emphasis added.) [R. 54.]

Respondent would not be prevented from buying a home nor from living in it by this action. Likewise, respondent's rights are not affected directly and they will not be affected indirectly. The words "result," indirect," "buy a home and live in it" are the heart of the opinion and have no application to respondent.

It is evident that the state court has attempted to base its opinion upon the supposed and purely speculative rights of persons unknown, not parties to this action, and upon the *Shelley* case. Although this has the appearance of two grounds for decision there is really only one because the state court has attempted to apply the decision in the *Shelley* case to the case at bar only because of the supposed and purely speculative rights of persons unknown, not parties to this action, all contrary to the decisions of this court and in violation of petitioners' constitutional rights. Surely, strangers do not have more rights in property than the owners thereof. When non-Caucasians are protected in the use and ownership of their own property, after they have acquired it, their constitutional rights are satisfied. They do not have the right of eminent domain in the property of others, and even if they did, it could not be asserted in this action to which they are not parties.

## Argument.

According to the brief filed in this Court by the petitioners in *McGee v. Sipes, supra,* the single question presented was as follows:

(Quoting from p. 43.)

> "Does the enforcement by state courts of an agreement restricting the disposition of land by prohibiting its use and occupancy by members of unpopular minority groups, *when neither the willing seller nor the willing purchaser was a party to the agreement* imposing the restriction, violate the Fourteenth Amendment and treaty obligations under the United Nations Charter?" (Emphasis added.)

The fact that the petitioners were not parties to the agreement and therefore had not consented to the state action was the basis for strong argument in briefs for petitioners in *Hurd v. Hodge, supra.* The other contention relied upon by all petitioners in the restrictive covenant cases was that the contracts were void. The rejection by this Court of the latter contention is evidenced by the reaffirmance of the Civil Rights Cases, 109 U. S. 3, 27 L. Ed. 855, and *Corrigan v. Buckley, supra.* The fact that the opinion of this Court was limited to cases where the individuals before the court were not parties to the contract is evidenced by the consistent application of the statements made in the opinions to "these petitioners" or "petitioners," and by the fact that *all of the authorities cited were examples of state action taken without the consent of the individuals before the court.* None of the authorities cited in the opinions in *Shelley*

*v. Kraemer, supra,* and *Hurd v. Hodge, supra,* could be cited as analogous in a case involving actual valid consent by the individual before the court by a valid contract without destroying the enforceability of nearly all contracts. If a classification is bad in a contract because it would be bad in a statute, then nearly all contracts must fail because nearly all require the parties to do things which a statute or ordinance could not order them to do. The classifications in contracts are not tested, in an action between the original parties, by the equal protection of the laws rule of reasonable relation to a valid legislative purpose, *i. e.,* public health, welfare, safety, morals, etc., because the original parties have expressly consented to the classification and to the state action of the court in enforcing them.

The District Court of Appeal of the State of California, Second Appellate District, failed to realize that courts of justice cannot and the Constitution of the United States does not require them to completely disregard all considerations of race, especially where all parties before the court have expressly agreed to the classification by valid contract for consideration already received.

Assume a case involving the following facts:

X owns a home in a neighborhood of good friends. For some reason he must sell but does not wish to displease nor injure his friendly neighbors. He lists his home with a real estate broker by a written contract containing the express provision that the dealer must find a Caucasian purchaser in order to earn his commission. The dealer produces a non-Caucasian buyer ready, willing and able to buy, but X will not sell. The dealer sues X for his commission on the theory that the con-

tract is valid and the state court cannot enforce the classification because it would be bad if contained in a statute. The contract is not void, so the court cannot deny relief for that reason. The court must either recognize and enforce the classification consented to by both contracting parties or else allow the dealer his commission.

Assume a second case involving the following facts:

X owns an apartment house. X employs an agent to operate it. A written contract of emplöyment with the agent provides that the agent will not permit any of the apartments to be occupied by non-Caucasians. The agent knowingly permits a non-Caucasian to occupy one of the apartments. The other tenants leave and X suffers loss of rents and profits and perhaps other pecuniary damages. X sues his agent for the damages suffered from the breach of duty. Here is a valid duty; is there no remedy for the breach of it because the court cannot recognize the classification which would be bad in a statute even though here it has been consented to by the individuals before the court?

Assume a third case involving the following facts:

X is a Caucasian. Y represents to X that he is a Caucasian. X marries Y. X learns that Y is not a Caucasian but has used makeup to deceive her. X sues to have her marriage annulled for fraud. Does the Constitution prohibit the courts from recognizing a classification based on race? Here the defendant would not have consented to the recognition by the court of the classification, and the court action would be state action which could not be taken by the legislature.[15]

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[15] *Perez v. Sharp*, 32 Cal. 2d 711. (Miscegenation statute.)

Assume a fourth case involving the following facts:

X is a Caucasian child, the ward of the court and the subject of contested adoption proceedings. B and C are husband and wife of the Caucasian race, of good character and means. D and E are husband and wife of non-Caucasian race, of good character and means. Other things being about equal, the court feels that the welfare of the child would be best served by placing him with the Caucasian husband and wife. Here is state action taken by the court without the consent of D and E based upon a classification which might be bad in a statute.

It must be apparent that a court cannot dispense justice if it is totally blind to the distinctions which nature has created and to which free men have attached importance in their most personal associations. This is so even in cases where the defendant has not consented to the classifictaion, and it must be even more apparent where the race of the litigants is not involved and the action of the court is consented to by all individuals before the court by valid contract for valid consideration already received and enjoyed.

One constitutional right should not be used to destroy another constitutional right, especially by a strained and unnatural application of the first, and most especially in a case where the owners of the first right are not parties to the action. Instead, constitutional rights of individuals before the court should be harmonized if there is a need. In the case at bar the only constitutional right involved is the right of both petitioners and respondent to contract and enforce their valid contract. Respondent has enjoyed the full fruits of her valid contract and is constitutionally bound to answer for its breach.

Suppose John Doe purchased a house and his neighbor came to him and offered him $1,500.00 if he would promise that his house would never be occupied by a non-Caucasian? Suppose John Doe accepted the $1,500.00 cash and gave his written promise to his neighbor? Could he then, after a week or so, permit a non-Caucasian to move into his house without being liable for damages actually suffered by his neighbor from said breach? John Doe has signed a constitutionally valid contract.[16] Does the Constitution protect him in his breach of it?

It is plain, therefore, that individuals may, for consideration, constitutionally contract to do or not to do things which a legislative body cannot order them to do, and that courts, relying on contracts, may give damages for the doing or failure to do things which the court could not order them to do or punish them for doing in reliance only upon an ordinance or a statute or its own substantive or procedural rule. Statutes and other state action taken without the consent of the individual before the court must be tested by the police power test, but contracts do not have to be and cannot be so tested when the original parties to the contract are before the court. Few, if any, contracts could survive the test.

The District Court of Appeal of the State of California, Second Appellate District, failed to give effect to the distinctions existing between *Shelley v. Kraemer, supra,* and the case at bar, to wit: All the authorities cited in *Shelley v. Kraemer* involved state action taken without the consent of the individuals before the court; they were not parties to the contract, and did not even

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[16]The contract is also valid by the common law of the State of California [R. 34].

know of the covenant until after they purchased the property; they were themselves Negroes; the action sought was injunction; extreme and unwarranted hardships would have resulted to the individuals before the court from the state action, whereas in the case at bar extreme and unwarranted hardship must result to individuals before the court only by this state inaction. No hardship can result to respondent herein beyond that contracted and paid for.

## Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: December 20, 1952.

Respectfully submitted,

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